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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

STATE OF ARIZONA,
Plaintiff,

vs.

JOHN RODRIQUES MONTEIRO,
Defendant.

No. CR-2013-1479

**MOTION IN LIMINE RE: ARIZONA
MEDICAL MARIJUANA ACT**

STATE OF ARIZONA,
Plaintiff,

vs.

JORDAN KAY PETERMAN,
Defendant.

No. CR-2013-1480

**MOTION IN LIMINE RE: ARIZONA
MEDICAL MARIJUANA ACT)**

The State of Arizona, by the Mohave County Attorney and through the undersigned deputy, Megan McCoy, herein submits the State's proposition regarding the legal, procedural, and evidentiary implications of the Arizona Medical Marijuana Act (AMMA) at trial.

1 There are two clear issues as to the AMMA analysis in this case:

- 2 1) The AMMA does not immunize the defendants from prosecution because
3 they have both admitted to transfer of marijuana for value, and therefore both
4 lose all protection under the AMMA under the *Fields* and *Matlock* analysis.¹
5 2) The AMMA in its plain language requires a judicial determination of immunity,
6 which would be made pursuant to a defendant's motion to dismiss, and does
7 not provide any basis for an affirmative defense to guilt.²

8 The State moves the Court to deny the defendants' request to apply the AMMA
9 as an affirmative defense, without statutory basis, and refuse to instruct the jury thereof.

10 The State asks the Court to make a ruling that the AMMA is not a jury
11 determination, but a judicial one, as it does not provide any basis for immunity in this
12 case due to the allegation of and admission to sales by the defendants.

13 The State further asks the Court preclude the defendants from arguing that the
14 AMMA either allowed their conduct or that they were under the belief that their
15 actions were legal under the AMMA. These are not appropriate defenses in this case.

16 And the State finally asks that an instruction be made alerting the jury that the
17 determination of AMMA is for the judge not jury, to ensure there is no confusion on the
18 part of the jury.

18 **AMMA IS NOT AN AFFIRMATIVE DEFENSE**

19 At the hearing on July 8, 2015, the State became aware the defendants intended
20 to have the jury instructed on the AMMA as an affirmative defense. Neither defendant
21 has complied with the requirements of Arizona Rule of Criminal Procedure 15.2 in giving

22 ¹ "[B]y the plain language of the statute, immunity from prosecution is conditioned on, inter alia, a
23 cardholder "not possess[ing] more than the allowable amount of marijuana" and not improperly
24 transferring marijuana." *State v. Fields*, 232 Ariz. 265, ¶ 13 -14 (App. 2013).
25 "We therefore agree with the state that, if the cardholder does not comply with those conditions, he or she
may be prosecuted for marijuana-related offenses. ***None of a cardholder's marijuana use or
possession is protected by the AMMA if he or she fails to abide by the enumerated conditions.***"
State v. Fields, 232 Ariz. 265, ¶ 13 -14 (App. 2013).
State v. Matlock, 713 Ariz. Adv. Rep. 20 (App 2015) recently held that the AMMA did not provide
defendant, who was a registered qualifying patient, immunity from prosecution for providing marijuana to
another registered qualifying patient in return for something of value.

² A.R.S. § 36-2811.
Monteiro/CR-2013-1479

1 notice of any defense beyond a “General Denial,” and so the State was surprised that
2 the defendants intended AMMA to be used an affirmative defense that would in the
3 instructions put to the jury. The defendants are not accused of conduct that is protected
4 under the AMMA, and so the application of AMMA as an affirmative defense is not
5 within the legal application of AMMA nor is it one available to those charged with sales
6 charges.

7 The AMMA statutes do not create a defense to guilt. The AMMA is a statutory
8 scheme to shield defendants from consequences (specifically, arrest, prosecution, and
9 punishment, as well as discrimination or civil penalties), but only if the cardholders are
10 in compliance with the AMMA. It is the defendant’s burden to file a motion to dismiss,
11 and prove to the Court that they are immune from prosecution and therefore charges
12 must be dismissed.

13 It is still Arizona law that possession, use, sale, cultivation and transportation of
14 marijuana are felonies. A.R.S. § 13-3405. Only possession and distribution within the
15 AMMA scheme is protected. A.R.S. § 36-2811.

16 **WHAT IS PROTECTED UNDER AMMA?**

17 AMMA designates various subsets of cardholders, and protects them in a
18 criminal arena from “arrest, prosecution or punishment” as long as they are in
19 compliance with the AMMA. See A.R.S. § 36-2801, et sec.

20 A.R.S. § 36-2801(2) defines a “cardholder” as “a qualifying patient, a designated
21 caregiver or a nonprofit medical marijuana dispensary agent who has been issued and
22 possesses a valid registry identification card.” So, under the law there are three types of
23 cardholders: 1) patients, 2) designated caregivers, and 3) dispensary agents, and each
24 type of cardholder is protected in various authorized actions and possessions of
25 marijuana under the AMMA.

A.R.S. § 36-2802 states that “this chapter does not authorize any person to
engage in, and does not prevent the imposition of any civil, criminal or other penalties

1 for engaging in the following conduct” ... “(E) Using marijuana except as authorized
2 under this chapter.” A person who is not using marijuana *as authorized* is still subject to
3 the imposition of criminal consequences.

4 A.R.S. § 36-2811, in subsection B, provides the protection for those in
5 compliance with the AMMA, stating that a “registered qualifying patient or registered
6 designated caregiver is not subject to arrest, prosecution or penalty in any manner” . . .

- 7 1) “[f]or the registered qualifying patient's medical use of marijuana pursuant to
8 this chapter, if the registered qualifying patient does not possess more than
9 the allowable amount of marijuana” and
10 2) “for the registered designated caregiver assisting a registered qualifying
11 patient to whom he is connected through the department's registration
12 process with the registered qualifying patient's medical use of marijuana
13 pursuant to this chapter if the registered designated caregiver does not
14 possess more than the allowable amount of marijuana” and
15 3) “For offering or providing marijuana to a registered qualifying patient or a
16 registered designated caregiver for the registered qualifying patient's medical
17 use or to a registered nonprofit medical marijuana dispensary if nothing of
18 value is transferred in return and the person giving the marijuana does not
19 knowingly cause the recipient to possess more than the allowable amount of
20 marijuana.”

21 A.R.S. § 36-2811(A) outlines how there is a presumption of “medical use” of
22 marijuana, one aspect that is required for immunity as outlined above. This subsection
23 provides that there is a “presumption that a qualifying patient or designated caregiver is
24 engaged in the medical use of marijuana pursuant to this chapter.”

25 This presumption only exists under the subsection if the qualifying patient or
designated caregiver is in possession of a registry identification card *and* is in
possession of an amount of marijuana that does not exceed the allowable amount of

1 marijuana. Further, the presumption may be rebutted by evidence that conduct related
2 to marijuana was not for the purpose of treating or alleviating the qualifying patient's
3 debilitating medical condition or symptoms associated with the qualifying patient's
4 debilitating medical condition to this chapter.

5 This distills into an immunity from prosecution if the cardholder's marijuana was
6 under the allowable amount and actually for a medical purpose of the qualifying patient
7 or the caregiver's registered qualifying patient, and that it may be provided by a
8 qualifying patient or designated caregiver if nothing of value is transferred in return.

9 There is guidance regarding this immunity in the 2013 case, *State v. Fields*, on
10 the application of this AMMA shield from arrest, prosecution or punishment. *State v.*
11 *Fields*, 232 Ariz. 265 (App. 2013). In the *Fields* case, which defendant Peterman also
12 cites in her brief, a defendant filed a motion to dismiss the charges against him under
13 the AMMA (because the AMMA is a bar to prosecution not a defense, and so it is not an
14 issue submitted to the jury in this caselaw).

15 The *Fields* court clearly outlined the protections under the AMMA:

16 "In § 36–2811, the AMMA provides two different statutory protections for
17 cardholders. First, in subsection (A), the statute provides a presumption that the
18 cardholder is engaged in medical use of marijuana if he or she has a valid card
19 and does not possess more than the allowable amount of marijuana. This
20 presumption may be rebutted by a showing that the cardholder was using or
possessing the marijuana for reasons other than medical use. § 36–2811(A)(2).
Once rebutted, the presumption disappears and the cardholder may be charged
with marijuana-related offenses. See *Korzep v. Superior Court*, 172 Ariz. 534,
539–40, 838 P.2d 1295, 1300–01 (App.1991)(if presumption has been rebutted,
it vanishes)

21 "Second, separate from this presumption, the AMMA affords immunity from
22 prosecution by providing that a cardholder may not be prosecuted for medical
23 use of marijuana "if the registered qualifying patient does not possess more than
24 the allowable amount of marijuana." § 36–2811(B)(1)(emphasis added). Thus, by
the plain language of the statute, immunity from prosecution is conditioned on,
inter alia, a cardholder "not possess[ing] more than the allowable amount of
marijuana" and not improperly transferring marijuana. § 36–2811(B)(1), (3).

25 We therefore agree with the state that, if the cardholder does not comply with
those conditions, he or she may be prosecuted for marijuana-related offenses.

1 ***None of a cardholder's marijuana use or possession is protected by the***
2 ***AMMA if he or she fails to abide by the enumerated conditions.***

3 (*State v. Fields*, 232 Ariz. 265, ¶ 13 -14 (App. 2013); emphasis added)

4 In fact, under *Fields*, the trial court had initially instructed the prosecutor to go
5 and instruct the grand jury on multiple theories of the AMMA, and the appellate court's
6 holding reversed that order stating that the legal interpretation of AMMA was for the
7 Court, not the jury.

8 The procedure in *Fields*, a motion for dismissal, is the appropriate action under
9 AMMA, where if someone is immune they cannot even be *charged*. There is an
10 immunity from prosecution, not any affirmative defense against guilt, in the AMMA as
11 written.

12 In claiming protection under this statutory immunity, it is a defendant's burden to
13 "plead and prove," by a preponderance of the evidence, that his or her actions
14 fall within the range of immune action. *Fid. Sec. Life Ins. Co. v. Ariz. Dep't of Ins.*,
15 191 Ariz. 222, ¶ 9, 954 P.2d 580, 583 (1998); *cf. State v. Rhymes*, 129 Ariz. 56,
16 57, 628 P.2d 939, 940 (1981) (defendant has burden to show existence of
17 immunity agreement by preponderance of evidence). Whether such immunity
18 exists is a question of law for the trial court. *Link v. Pima Cnty.*, 193 Ariz. 336, ¶
19 18, 972 P.2d 669, 674 (App.1998).

20 *State v. Fields*, 232 Ariz. 265, 269 (App. 2013), review denied (Feb. 11, 2014).

21 In a civil context, this may be a mixed determination by court and jury:

22 "If the existence of immunity turns on disputed factual issues, the jury determines
23 the facts and the court then determines whether those facts are sufficient to
24 establish immunity." *Chamberlain v. Mathis*, 151 Ariz. 551, 554 (1986).

25 However, this caselaw that states that immunity may be properly raised in a
motion to dismiss, if the facts establishing the occasion for privilege appear in the
pleadings, and ultimately this caselaw requiring a split decision between court and jury
is in a civil context where there is not immunity from suit but from liability (the outcome).
In the AMMA it is wholly different due to the criminal protections, the immunity is from
"arrest, prosecution or punishment." The defendants, akin to a double jeopardy context,
are protected from prosecution, and as the court determines facts in search and seizure

1 litigation, and double jeopardy litigation, prior to trial in order to protect a defendant's
2 rights, upon a motion to dismiss due to immunity from prosecution.

3 Further, the facts of this case are not in dispute, the officer found what they
4 found, the defendants said what they said, and it is the legal application of AMMA that
5 appears to be contested (as well as whether the State can prove the elements of the
6 crime beyond a reasonable doubt, which is the State's duty). This decision of immunity
7 in this case is a decision for the Court. The affirmative defense and instructions
8 proffered by Peterson are not appropriate under the actual statutory scheme or the
9 caselaw.

10 So, there are protections, in the form of actual *immunity from prosecution*, but
11 only if the cardholders are in compliance with the AMMA. The presumption in AMMA is
12 that there is a medical purpose, which may be rebutted or lost in possessing in excess
13 of the cardholder's allowable amount or by conducting transfers of marijuana for value,
14 in the Court's determination of immunity from prosecution.

15 The defendants are not immune from prosecution for sale charges, as
16 possession for sale (transfer of marijuana for value) and conspiracy to sell marijuana
17 are not protected acts under the qualifying patient cardholder or designated caregiver
18 cardholder protections. And so the card is not a "defense" to the crimes alleged, and if
19 the defendants are found guilty of these crimes they may be punished for such conduct.
20 There is no separate affirmative defense to these crimes, and no separate decision for
21 the jury.

22 The requirements for immunity include complying with 1) the "allowable amount"
23 2) the "medical use" and 3) allows "transfer" but only if nothing of value is exchanged in
24 return. If any of these is not complied with, the defendants lose all immunity of the
25 AMMA.

1 **EVEN IF DEFENDANTS DID FILE A MOTION TO DISMISS,**

2 **AMMA DOES NOT GRANT ANY IMMUNITY IN THIS CASE**

3 There is no immunity to be found in the facts in this case – likely why there has
4 been no motion to dismiss, and a sign that the defendants' intent is in hoping for jury
5 nullification of the actual legal structure by attempting to make this legal determination a
6 jury decision.

7 In this case, officers searched the home of defendants on August 15, 2013. The
8 officers seized six items of evidence that contained marijuana and there were also six
9 plants seized. The baggies and bowl of marijuana were located in the defendants'
10 bedroom, in the kitchen, in the garage, and in the Dodge Durango. Two of these six
11 items of evidence containing marijuana were tested by the laboratory, and those two
12 items weighed the 2.5 ounces allowed to a cardholder. The rest of the marijuana in the
13 home was weighed by officers in their ziplock packaging for a total of 57 grams, and all
14 of that 57 grams is in excess of the 2.5 ounces allowable to any one cardholder.

15 The six plants were in the backyard, not in any enclosed area as required by
16 statute.

17 The defendants were cardholders, but were not in compliance with AMMA's
18 allowable amount or medical purpose and admitted engaging in transfer of marijuana for
19 value. Due to their lack of compliance in these required areas, the defendants are not
20 entitled to *any* protections of AMMA and may be charged with marijuana related
21 offenses.

22 John Monteiro possessed a qualifying patient card that authorized cultivation as
23 well as a single designated caregiver card. He stated he did not use marijuana, and
24 only grew marijuana for distribution. He wouldn't name the qualified patient to whom he
25 was a caregiver, and stated that he traded marijuana to people, exchanging marijuana
 for things he needed. He described it as patient to patient transfer for compensation.
 He also stated people give him money to cover the cost of his gas for delivering. The

1 defendant stated he distributed to everyone in the home, the other persons in the home
2 were identified as Jordan Peterman, Joshua Clayton Lee, and Candice Jean Wirth.
3 Peterman and Lee had medical marijuana cards, but were not the designated patient of
4 Monteiro. Wirth was not a card holder.

5 Peterman had a qualifying patient card only, and stated that she delivered
6 marijuana for Monteiro.

7 ALLOWABLE AMOUNT OF MARIJUANA

8 First, there is a rebuttable presumption that either defendant, as a cardholder,
9 was engaged in the medical use of marijuana under the AMMA if he or she did not
10 possess more than the allowable amount of marijuana. See A.R.S. 36–2811(A); *State v.*
11 *Fields*, 232 Ariz. 265, 269 ¶ 13 (App. 2013).

12 “Once rebutted, the presumption disappears and the cardholder may be charged
13 with marijuana-related offenses.” *Fields*, 232 Ariz. at 269 ¶ 13.

14 The “allowable amount of marijuana” is defined for both qualified patients and
15 designated caregivers under A.R.S. § 36-2801(1):

16 “Allowable amount of marijuana”

17 (a) With respect to a qualifying patient, the “allowable amount of marijuana”
18 means:

- 19 (i) Two-and-one-half ounces of usable marijuana; and
20 (ii) If the qualifying patient's registry identification card states that the qualifying
patient is authorized to cultivate marijuana, twelve marijuana plants contained in
an enclosed, locked facility except that the plants are not required to be in an
enclosed, locked facility if the plants are being transported because the qualifying
patient is moving.

21 (b) With respect to a designated caregiver, the “allowable amount of marijuana”
22 for each patient assisted by the designated caregiver under this chapter means:

- 23 (i) Two-and-one-half ounces of usable marijuana; and
24 (ii) If the designated caregiver's registry identification card provides that the
designated caregiver is authorized to cultivate marijuana, twelve marijuana plants
contained in an enclosed, locked facility except that the plants are not required to
be in an enclosed, locked facility if the plants are being transported because the
designated caregiver is moving.

25 (c) Marijuana that is incidental to medical use, but is not usable marijuana as
defined in this chapter, shall not be counted toward a qualifying patient's or
designated caregiver's allowable amount of marijuana.

1 Under A.R.S. § 36-2801 (8) "Marijuana" means all parts of any plant of the genus
2 cannabis whether growing or not, and the seeds of such plant. Under A.R.S. § 36-
3 2801(15) "Usable marijuana" means the dried flowers of the marijuana plant, and any
4 mixture or preparation thereof, but does not include the seeds, stalks and roots of the
5 plant and does not include the weight of any non-marijuana ingredients combined with
6 marijuana and prepared for consumption as food or drink.

7 Based on his cards, Monteiro had the authority to have 5 ounces for medical use.
8 He could have 2.5 ounces for his personal use, however he told the police he didn't use.
9 He could also have 2.5 ounces for the care of his designated patient (identity still
10 unknown due to DHS records being kept secret, but the patient identification number
11 was not anyone in the home). Peterman could possess 2.5 ounces for her own medical
12 use. Lee could possess 2.5 ounces for his medical use. There was over 2.5 ounces of
13 marijuana in the home, and none seemed to be exclusively possessed by any particular
14 resident of the home. Lee stated that "2.5 ounces" of the marijuana in the home was
15 his. It appeared that all of their allowable amounts of marijuana in the home were
16 essentially being added together and comingled, with the intent to deliver and sell.

17 Because these amounts of marijuana were not possessed in a safe or accessible
18 by only the cardholder, because they were possessing together, each person in the
19 home possessed more than the allowable 2.5 ounces. Also, as argued below, they did
20 not possess for the allowed medical purpose of treating their own debilitating conditions
21 and Monteiro's qualifying patient, but for sale and were actually completing sales. The
22 defendants lose protection under the AMMA by possessing more than the allowable
23 amount.

24 Monteiro had authority on his qualifying patient card to cultivate, and the
25 allowable amount would be up to 12 plants in an enclosed, locked facility. A.R.S. § 36-
2801(6) defines an "enclosed, locked facility" as: "a closet, room, greenhouse or other
enclosed area equipped with locks or other security devices that permit access only by

1 a cardholder.” The regulations of AMMA under Title 9 Chapter 17 of the Arizona
2 Administrative Code further define what the statute means. “Enclosed area” when used
3 in conjunction with “enclosed, locked facility” means outdoor space surrounded by solid,
4 10-foot walls, constructed of metal, concrete, or stone that prevent any viewing of the
5 marijuana plants, and a 1-inch thick metal gate. R9-17-101 (16).

6 The six plants were in the backyard, and were not in a locked, enclosed area.
7 The plants were visible from outside of the yard. The yard’s walls were concrete,
8 however they were only about five feet tall and the gates were not 1 inch thick metal and
9 they were not locked, allowing access to the grow by anyone (not just cardholders, as
10 required).

11 The plants did not qualify as an “allowable amount of marijuana” and not entitled
12 to any presumption of medical use or immunity.

13 Neither the marijuana nor the plants complied with the “allowable amount” and
14 any immunity claim under AMMA is therefore not available for the defendants.

15 MEDICAL USE

16 A.R.S. § 36-2801 (9) “Medical use” means the acquisition, possession,
17 cultivation, manufacture, use, administration, delivery, transfer or transportation of
18 marijuana or paraphernalia relating to the administration of marijuana to treat or
19 alleviate a registered qualifying patient's debilitating medical condition or symptoms
associated with the patient's debilitating medical condition.

20 In this case, Monteiro and Peterman stated that they are delivering and
21 transferring marijuana, in exchange for things of value and “donations.” Simply calling
22 profits donations does not make them allowable. Their purpose in possession, delivery,
23 transfer of marijuana was not for a medical purpose, but for sale.

24 Monteiro stated he does not use the marijuana, he just grows and distributes it.
25 He had business cards to this effect, he was engaging in marijuana sales as a business.
And yet he still possessed a “qualifying patient” card. Under his statements, none of the

1 marijuana was for the medical use of his patient card, since he was not using it to treat
2 his debilitating condition or symptoms related thereto. Monteiro also had the designated
3 caregiver card, but that related solely to his designated patient, and while he could
4 receive costs from that patient, he could not receive anything of value from any other
5 cardholder.

6 The business of medical marijuana sales in Arizona is intentionally written to
7 eliminate greed and profits from what has always been a black market of illegal drug
8 sales. Patients may transfer but not in exchange of anything of value. Caregivers may
9 be compensated their costs by their designated patient. And even dispensaries must
10 be nonprofit under the AMMA. Monteiro's actions, in selling marijuana with Peterman,
11 were not for a medical purpose.

12 TRANSFERS IN EXCHANGE FOR VALUE (AKA "SALES")

13 The defendants were selling marijuana, and have therefore been charged with
14 marijuana crimes. A cardholder "is not subject to arrest, prosecution or penalty in any
15 manner,"

16 [f]or offering or providing marijuana to a registered qualifying patient ... **if nothing**
17 **of value is transferred in return** and the person giving the marijuana does not
18 knowingly cause the recipient to possess more than the allowable amount of
19 marijuana.

20 A.R.S. § 36–2811(B)(3).

21 The recent decision in *State v. Matlock*, 713 Ariz. Adv. Rep. 20 (App 2015) held
22 that the Arizona Medical Marijuana Act (AMMA) did not provide defendant, who was a
23 registered qualifying patient, immunity from prosecution for providing marijuana to
24 another registered qualifying patient in return for something of value.

25 The defendants violated the AMMA because § 36–2811(B)(3) only allows
"patients ... to offer or provide marijuana to another patient ... if nothing of value is
transferred in return." The defendants possessed the marijuana for purpose of sale, and
conspired to sell marijuana. These intentions to transfer for value are not protected
conduct protected as "medical use"

1 As a factual matter, there is no sign that the transfers by the defendants were to
2 other patients, specifically persons who were cardholders and who were registered
3 qualifying patients (i.e., an AMMA cardholder) as required by A.R.S. § 36–2811(B)(3)
4 for defendants to claim immunity. Further, Monteiro stated he provided the people in
5 the home, and Wirth was not a cardholder.

6 Further, the text messages as well as the statements of the defendants in this
7 case indicate that they were transferring marijuana for items of value. Calling money
8 and “things” donations does not make them legal, as the defendants were not permitted
9 under AMMA to receive anything of value in their activities.

10 The court in *State v. Matlock* spoke eloquently regarding the AMMA structure of
11 dissuading any profiteering:

12 The AMMA evinces a spirit of permitting patients to acquire the medicine they
13 need, not creating a profitable medical marijuana industry. The AMMA makes
14 clear that medical marijuana dispensaries must be “not-for profit” and can only
15 receive payment for “expenses incurred in [their] operation.” § 36–2801(11).
16 Similarly, designated caregivers “may not be paid any fee or compensation” for
17 their services but can only be reimbursed their “actual costs.” § 36–2801(5)(e).
18 Allowing registered qualifying patients to provide marijuana in exchange for
19 something of value would therefore be the exception. And, allowing such patient-
20 to-patient transactions would, as the state points out, create an “incentive to
21 embark on a sales enterprise.”

22 713 Ariz. Adv. Rep. 20 (App 2015).

23 Because the AMMA does not allow patients to accept anything in exchange of
24 value, the defendants lose any claim of immunity due to these transactions and the
25 State can pursue marijuana charges.

26 DESIGNATED CAREGIVER, STILL CAN'T SELL

27 Monteiro is also a designated caregiver, defined as follows:

28 A.R.S. § 36-2801(5)

29 “Designated caregiver” means a person who:

- 30 (a) Is at least twenty-one years of age.
- 31 (b) Has agreed to assist with a patient's medical use of marijuana.
- 32 (c) Has not been convicted of an excluded felony offense.
- 33 (d) Assists no more than five qualifying patients with the medical use of
34 marijuana.

1 (e) **May receive reimbursement for actual costs incurred in assisting a**
2 **registered qualifying patient's medical use of marijuana if the registered**
3 **designated caregiver is connected to the registered qualifying patient**
4 **through the department's registration process.** The designated caregiver may
5 not be paid any fee or compensation for his service as a caregiver. Payment for
6 costs under this subdivision shall not constitute an offense under title 13, chapter
7 34¹ or under title 36, chapter 27, article 4.²

8 Per A.R.S. § 36-2804.04, the registry card of a designated caregiver shall have a
9 random identification number, as well as the identification number of the registered
10 qualifying patient the designated caregiver is assisting.

11 There is one qualifying patient associated with Monteiro, and that patient may
12 reimburse Monteiro "actual costs" incurred in Monteiro's assistance of that qualifying
13 patient in that patient's medical use of marijuana. Monteiro, even as a designated
14 caretaker, is not allowed to accept reimbursement or anything of value from any other
15 patients. He stated he transferred for donations and items of value to multiple patients.

16 Monteiro, even as a caregiver is not protected by the AMMA and his actions
17 mean that the State may charge him with marijuana crimes and try him.

18 Caregiver designation may be better understood when contrasted with
19 dispensary, a business registered with DHS that is authorized to distribute medical
20 marijuana for payment.

21 A.R.S. § 36-2801 (11) "Nonprofit medical marijuana dispensary" means a not-for-
22 profit entity that acquires, possesses, cultivates, manufactures, delivers, transfers,
23 transports, supplies, sells or dispenses marijuana or related supplies and educational
24 materials to cardholders. A nonprofit medical marijuana dispensary may receive
25 payment for all expenses incurred in its operation.

Under A.R.S. § 36-2806.02, "Dispensing for Medical Use," there are
requirements before a dispensary can sell marijuana, including verification in the system
to determine that the identification card is valid, the person presenting the card is the
patient, that the amount would not exceed the allowable amount for the patient, and
then enter information as to the amount being distributed.

1 Of particular import, § 36–2811(E), (F) explicitly addresses the sale of marijuana.
2 Those subsections provide immunity to registered nonprofit medical marijuana
3 dispensaries and registered dispensary agents for “sell[ing] ... marijuana ... to registered
4 qualifying patients.”

5 The defendants were not dispensary agents, and so not vested with the right to
6 reimbursement in marijuana transfer. The text messages and defendant admissions
7 show an ongoing enterprise by the defendants to sell marijuana. Once AMMA has been
8 breached, by sale, the defendants lose all protection of AMMA and may be prosecuted
9 for marijuana crimes.

10 **AMMA IS NOT A JURY ISSUE, AND SHOULD BE PRECLUDED**

11 The Court should preclude defendants, and their counsel, from soliciting
12 testimony or arguing to the jury that the presumption provided in the Act (A.R.S. § 36-
13 2811.A) or the protections provided in the Act (A.R.S. § 36-2811.B) can or should be
14 applied to defendants because neither defendant qualifies for such presumption or
15 protection as a matter of law. Additionally, this evidence should not come in at trial
16 because it will confuse the issues and will mislead the jury in violation of Rule 403.

17 Rule 403 provides that the Court may exclude evidence, even if it is otherwise
18 relevant, if its probative value is substantially outweighed by a danger of, among others,
19 “confusing the issues [or] misleading the jury.”

20 In this case, the defendants have both had ample opportunity in the two years of
21 the case pendency to make the minimal showing that they qualified for the presumption
22 or other protections of A.R.S. § 36-2811 A and B, but have failed to do so and are
23 unable to do so.

24 A.R.S. § 36-2811.A provides a presumption that a “qualifying patient...is
25 engaged in the “medical use” of marijuana” “if” the “qualifying patient” is in “possession
of a registry identification card” and in “possession of an amount of marijuana that does

1 not exceed the allowable amount of marijuana.” *Emphasis added*. This presumption
2 may be rebutted.

3 A.R.S. § 36-2811.B provides that a person is “not subject to arrest, prosecution
4 or penalty in any manner” for

5 1) “medical use of marijuana pursuant to this chapter” “if” he or she “does not
6 possess more than the allowable amount of marijuana”³

7 2) “offering or providing marijuana” to a “registered qualifying patient” or a
8 “registered designated caregiver” for the registered qualifying patient's medical
9 use or to a registered nonprofit medical marijuana dispensary **if nothing of**
10 **value is transferred in return.**

11 The defendants do not garner the protection of A.R.S. § 36-2811(B) as they
12 possessed plants that were not “an allowable amount” and transferred marijuana for
13 donations and items of value.

14 Allowing defendants to argue to a jury that they somehow qualify for a
15 presumption, much less a bar to prosecution, when they have not and cannot meet
16 these requirements (medical purpose, allowable amount, no transfers for value)
17 presents a very substantial danger for confusion and misleading of the jury. Because
18 defendants did not satisfy the requirements of the AMMA, they cannot now essentially
19 argue for the jury to nullify in contravention of the jury instructions they will swear to
20 uphold.

21 The State is not requesting a bar to the fact that medical marijuana cards had
22 been issued to the defendants, the Court should simply bar the argument to the jury 1)
23 that what the defendants were doing was legal because of the cards or 2) it was alright
24 because the defendants had cards and thought their actions were legal.

25 ³ “Allowable amount of marijuana” is defined in the AMMA for those authorized to cultivate as “twelve
marijuana plants contained in an **enclosed, locked facility**....” A.R.S. § 36-2801.1.a.ii. It is defined as
2.5 ounces for qualifying patients, and designated caregivers may possess 2.5 more ounces for their
patient.

This is not a jury determination – it is a judicial one. The Court should not abdicate its authority and judicially redraft the AMMA to fit into a jury determination, nor should it allow defendants to argue invalid defenses.

JURY INSTRUCTION NEEDED TO CLARIFY JURY ROLE VS. JUDICIAL

ROLE

The instruction that typically addresses a search by law enforcement that tells the jury that there are decisions that are made by the court, should include the AMMA, and be given as follows:

The legality of any search by law enforcement officers, or the legal impact of any medical marijuana cards, is not a matter for your consideration. If there were any such issue concerning the legality of these issues, that would be a legal issue which would be decided by myself rather than you.

CONCLUSION

The Court should make the determination that the protections of the AMMA in criminal context (immunity from arrest, prosecution and penalty) are necessarily judicial determinations, and deny the defendants' request for a jury determination of AMMA protection.

The State also respectfully requests that the Court preclude defendants from introducing evidence of defendant's belief that what they were doing was legal or any argument related to the AMMA presumption and bar to arrest, prosecution and penalty because it will confuse the relevant issues and will mislead the jury in violation of Arizona Rule of Evidence 403.

RESPECTFULLY SUBMITTED THIS 9TH DAY OF JULY, 2015.

MOHAVE COUNTY ATTORNEY
MATTHEW J. SMITH

By _____
DEPUTY COUNTY ATTORNEY
MEGAN MCCOY

1 A copy of the foregoing
2 sent this same day to:

3 HONORABLE LEE F. JANTZEN
4 SUPERIOR COURT JUDGE

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13 By _____
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